

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ARBUTUS BIOPHARMA
CORPORATION AND GENEVANT
SCIENCES GMBH,

Plaintiffs,)

v.)

MODERNA, INC. and MODERNATX,
INC.)

Defendants.)

EMANUEL MCCRAY, *On Behalf of*
Himself and All Others Similarly Situated,)

Intervenors-Plaintiffs.)

) Case No.: 22-cv-00252-MSG

) **NOTICE OF MOTION AND**
) **MOTION FOR CLASS**
) **CERTIFICATION**

) **PROPOSED CLASS ACTION**

To Plaintiffs Arbutus Biopharma Corporation and Genevant Sciences GmbH
and their attorneys of record, to Defendants Moderna, Inc. and ModernaTx, Inc. and
their attorneys of record, and to the United States and its attorneys of record,

PLEASE TAKE NOTICE that on _____, 2023, at _____ in the Courtroom

1 of the presiding judge in this case in the Federal Courthouse in Fort Worth, Texas,
2 or as soon thereafter as Plaintiffs-Intervenors may be heard, Plaintiffs-Intervenors
3 will and do hereby move the Court for an order certifying this case as a class action
4 pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure on behalf of
5 the following class of similarly situated persons:
6

7
8 All persons born or naturalized in the United States who are citizens of
9 the United States, and subject to the jurisdiction of the United States.

10 This motion is based upon the accompanying memorandum of law and upon
11 all other matters of record herein. In accordance with Local Rule 7.1.1, a
12 conference was not. The last action on the Docket occurred on February 22, 2023,
13 (Doc. 55), granting Motion for Pro Hac Vice Appearance of Attorney Nancy Kaye
14 Horstman.
15

16 Dated: February 26, 2023
17

18 Respectfully submitted,

19
20 
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**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

I. THE PROPOSED CLASS MEETS RULE 23.

A. General.

The proposed Complaint is incorporated herein as if repeated here.

In *Bond v. U.S.*, 564 U.S. 211, 222 (2011), the Supreme Court stated that:

“Fidelity to principles of federalism is not for the States alone to vindicate. The recognition of an injured person’s standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”

In *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979), the Supreme Court held that:

“[C]lass relief is appropriate in civil actions brought in federal court, including those seeking to overturn determinations of the departments of the Executive Branch of the Government in cases where judicial review of such determinations is authorized.... Indeed, a wide variety of federal jurisdictional provisions speak in terms of individual plaintiffs, but class relief has never been thought to be unavailable under them. (Citations omitted.) Where the district court has jurisdiction over the claim of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding.”

1 A class action may be established if (1) the class is so numerous that joinder
2 of all members is impracticable, (2) there are common questions of law or fact
3 concerning the class, (3) the claims or defenses of the representative parties are
4 typical of the claims or defenses of the class, *and* (4) the interests of the class will
5 be fairly and adequately protected by the representative parties. *In re Hydrogen*
6 *Peroxide Antitrust Litig.*, 552 F.3d 305, 309-310 (3d Cir. 2008), citing *Gen. Tel. Co.*
7 *of Sw. v. Falcon*, 457 U.S. 147, 155, 161 (quoting *Califano v. Yamasaki*, 442 U.S.
8 682, 700-01 (1979)).

9
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11
12 “The trial court, well-positioned to decide which facts and legal arguments
13 are most important to each Rule 23 requirement, possesses broad discretion to
14 control proceedings and frame issues for consideration under Rule 23.” *Id.* 552 F.3d
15 at 310.

16
17 “Defining a class as consisting of all persons who have been or will be
18 affected by the conduct charged to the defendants is entirely appropriate where only
19 injunctive or declaratory relief is sought.” *Rice v. City of Philadelphia*, 66 F.R.D.
20 17, 20 (E.D. Pa. 1974).

21
22 The proposed class is clear and is defined by whether Moderna and the
23 United States may constitutionally shift Moderna’s liabilities for its COVID-19
24 “prototype pathogen” vaccines to the United States in violation of the principles of
25 federalism and the separation of powers doctrine.
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1 Moreover, the existing parties cannot adequately protect the “powers”
2 reserved to the People of the United States in the Tenth Amendment without their
3 assistance.
4

5 **B. Numerosity and Impracticality of Joinder**

6 The proposed class satisfies Rule 23(a)(1) because the class size is
7 approximately 334,000,000 individuals and is “so numerous that joinder is
8 impractical.” Thus, the proposed class plainly satisfies the numerosity requirement
9 of Rule 23(a).
10

11 **C. Common Questions of Law or Fact**

12 All putative class members have the same rights guaranteed under the Federal
13 Constitution and certain “powers” reserved to them under the Tenth Amendment. A
14 sole discreet legal question all putative Plaintiffs-Intervenors share in common with
15 the existing Plaintiffs is may constitutionally shift Moderna’s liabilities for its
16 COVID-19 “prototype pathogen” vaccines to the United States in violation of the
17 principles of federalism and the separation of powers doctrine.
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21 **D. Typicality of Claims.**

22 Rule 23(a)(3) requires that the claims be “typical of the claims ... of the
23 class.” The loss of constitutional sovereignty and powers reserved to the People of
24 the United States is typical of the putative class. Because McCray is a citizen of the
25 United States and is among the “people” to whom the Tenth Amendment reserves
26
27
28

1 “powers not delegated to the United States by the Constitution, nor prohibited by it
2 to the States”, McCray has Article III standing to pursue declaratory relief under the
3 typicality requirements of Rule 23 and this Court has already pointed to the
4 difficulties Moderna and the United States face in their efforts to shift Moderna’s
5 liabilities to the United States.
6

7
8 Certification under Rule 23(b)(3), which is permissible when the court “finds
9 that the questions of law or fact common to class members predominate over any
10 questions affecting only individual members, and that a class action is superior to
11 other available methods for fairly and efficiently adjudicating the controversy.”
12 (Citation omitted.) The twin requirements of Rule 23(b)(3) are known as
13 predominance and superiority. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d at
14 310.
15

16
17 “Predominance ‘tests whether proposed classes are sufficiently cohesive to
18 warrant adjudication by representation.... Issues common to the class must
19 predominate.... [A] district court must formulate some prediction as to how specific
20 issues will play out in order to determine whether common or individual issues
21 predominate in a given case....” *Id.* 552 F.3d at 310-11.
22

23
24 In this case, McCray and the proposed class members’ legal and remedial
25 theories predominate and are exactly the same. The predominance, superiority and
26 typicality requirement of Rule 23(a)(3) are therefore satisfied.
27
28

1 **E. Adequacy of Representation.**

2 The final requirement for class certification, set out in Rule 23(a)(4), is that
3 the named plaintiffs “will fairly and adequately protect the interest of the class.”
4

5 McCray is a citizen of the United States. The Federal Constitution applies
6 equally to each citizen of the United States. See *Bond*, 564 U.S. at 222 (2011):
7
8 “Fidelity to principles of federalism is not for the States alone to vindicate.... The
9 structural principles secured by the separation of powers protect the individual as
10 well.” There are no formal or personal conflicts of interests between McCray, the
11 putative class members, and the single claim for declaratory relief which McCray
12 seeks to pursue.
13

14 Moreover, “[i]t is not ‘fatal if some members of the class might prefer not to
15 have violations of their rights remedied.’” *Lanner v. Wimmer*, 662 F.2d 1349, 1357
16 (10th Cir. 1981), citing *United States Fidelity Guaranty Co. v. Lord*, 585 F.2d 860,
17 873 (8th Cir. 1978) (quoting *Leisner v. New York Telephone Co.*, 358 F. Supp. 359,
18 372 (S.D.N.Y. 1973)), *cert. denied*, 440 U.S. 913, 99 S.Ct. 1228, 59 L.Ed.2d 462
19 (1979). Whether McCray will adequately represent the class is a question of fact to
20 be ‘raised and resolved in the trial court in the usual manner.’
21
22
23

24 **II. CONCLUSION**

25 For the foregoing reasons, this action for declaratory relief should be certified
26 as a class action pursuant to Fed.R.Civ.Proc., Rule 23(a) and (b).
27
28

1 Respectfully submitted this 26th day of February
2 2023.

3 

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SCIENCES GMBH,)
Plaintiffs,) **CERTIFICATE OF SERVICE**
v.)
MODERNA, INC. and MODERNATX,)
INC.)
Defendants.)
EMANUEL MCCRAY, *On Behalf of*)
Himself and All Others Similarly Situated,)
Intervenors-Plaintiffs.)

I hereby certify that on the 26th day of February 2023, I mailed a copy of the
following documents,

(1) MOTION TO INTERVENE

(2) CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF

(3) NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION,
with postage prepaid, to all parties addressed as follows:

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